No. 92-2058

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HAWAIIAN AIRLINES, INC., *et al.*,
Petitioners,
v.
GRANT T. NORRIS,
Respondent.

On Writ of Certiorari to the Supreme Court for the State of Hawaii

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BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

RALPH J. MOORE, JR.
(Counsel of Record)
I. MICHAEL GREENBERGER
MARK S. RAFFMAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
KENNETH GRADIA
NATIONAL RAILWAY LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7200

Attorneys for the National Railway Labor Conference

Dated: March 4, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF AMICUS CURIAE

The National Railway Labor Conference ("NRLC") is an unincorporated association that includes almost all of the nation's Class I railroads, employing more than 90% of all railroad employees, among its members. The Conference represents member railroads in multi-employer collective bargaining with unions pursuant to the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, and in regard to other labor-management relations matters that affect the railroads generally. Among other things, it assists and advises member railroads in connection with the mandatory system of arbitral remedies established by the RLA for settling disputes arising out of workplace grievances.

This case presents important questions concerning the scope of the adjustment system established by the Railway Labor Act. The decision below, which permits a dissatisfied employee to bypass the Act's grievance processes and instead bring suit in state court, subverts Congress's expressed and oft-repeated intent to create a comprehensive, mandatory, and exclusive system for resolving a broad range of workplace disputes without judicial intervention. Congress firmly believed that arbitration of such disputes is critical to peaceful labor-management relations in inherently interstate transportation industries. The Conference thus has a vital interest in ensuring that the adjustment procedures established by the RLA are not circumvented or undercut. Accordingly, the Conference files this brief as *amicus curiae* in support of the petitioners.[1]

SUMMARY OF ARGUMENT

I. A. The Railway Labor Act provides comprehensive procedures for resolving so-called "minor" disputes in the rail and airline industries. *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 723 (1945). "Minor" disputes are those

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[1] This brief is being filed with the written consent of all parties pursuant to Supreme Court Rule 37.3.

that "grow[] out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," 45 U.S.C. § 153 First (i), and are subject to mandatory and exclusive arbitration before RLA adjustment boards. "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 94 (1978).

The plain language of the RLA defines the minor dispute category expansively. It expressly states that the Act is designed "to provide for the prompt and orderly settlement of *all* disputes growing out of grievances *or* out of the interpretation or application of agreements," 45 U.S.C. § 151a (emphasis added), and commits such disputes to RLA arbitration. *Id.* §§ 153 First (i), 153 Second. This broad definition carries out Congress's intent of having rail and airline labor disputes resolved by individuals "peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist" in those industries. *Gunther* v. *San Diego & A.E. Ry.*, 382 U.S. 257, 261 (1965) (citation omitted). See pp. 6-9, *infra*.

B. The relevant legislative history confirms Congress's desire to encompass a broad range of grievances arising out of the employment relationship within the RLA's mandatory arbitral processes. Sponsors of the original 1926 legislation stated that the adjustment boards were designed to consider, *inter alia*, "grievances . . . of a personal nature," as well as "disputes rising out of the interpretation and application of existing agreements." See pp. 9-12, *infra*.

C. This Court's decisions confirm the RLA's plain language and legislative history showing that the RLA's mandatory dispute resolution procedures apply broadly to disputes arising out of the employment relationship. In *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989) ("*Conrail*"), quoting its decision in *Burley*, this Court again recognized that a minor dispute "relates either to the meaning or proper

application of a particular provision *or* to an omitted case" in which "the claim is founded upon some incident of the employment relation, or asserted one, *independent of those covered by the collective agreement*." 491 U.S. at 303 (emphasis added). This Court's decisions also make clear that the RLA procedures applicable to such disputes are not "optional, to be availed of as the employee or the carrier chooses." *Andrews* v. *Louisville & N. R.R.*, 406 U.S. 320, 322 (1972). See pp. 12-14, *infra*.

D. With respect to "whistleblower" claims of the type at issue here, Congress has expressly manifested its intention that such disputes be channeled to RLA arbitration. The Federal Railroad Safety Act, 45 U.S.C. § 431 *et seq.*, provides that a railroad may not "discharge or in any manner discriminate against" an employee who has reported a safety violation, *id.* § 441(a), and that "any dispute, grievance, or claim arising under this section" must be resolved through the RLA grievance process. *Id.* § 441(c). The legislative history of the FRSA makes clear that the statute did not *add* to the scope of the disputes that were already subject to mandatory RLA arbitration in the rail and airline industries; rather, Congress recognized that employees could "seek similar protection through normal grievance procedures" under "current law," *i.e.*, the RLA. RLA aribtrators have adjudicated retaliatory discharge disputes. The Fourth Circuit has recognized that Congress's provision of an arbitral remedy for these types of retaliatory discharge and discipline claims leaves no room for state-law tort suits based thereon. *Rayner* v. *Smirl*, 873 F.2d 60, 64-66 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989). See pp. 14-17, *infra*.

II. A. Although the Hawaii Supreme Court understood that "arbitration is the exclusive remedy for claims arising from minor disputes," Pet. App. 12a, it misread this Court's decision in *Conrail* as restricting the category of arbitrable minor disputes to those that "may be conclusively resolved by interpreting the existing . . . agree-

ment," Pet. App. 14a (quoting *Conrail*, 491 U.S. at 305). The quoted language from *Conrail* did not concern RLA preemption of laws outside the RLA, as the Hawaii Supreme Court concluded; instead, that language related only to the *internal* RLA question of what RLA dispute resolution procedures would apply when a carrier claims a contractual right to take an action and the union claims that the action constitutes a change in an existing agreement. Thus the context of the quoted language was a sentence which stated that "the distinguishing feature of *such a case* is that the dispute may be conclusively resolved by interpreting the existing agreement." 491 U.S. at 305. By contrast, that portion of *Conrail* which spoke to the scope of the RLA in its entirety recognized that the minor dispute category extends broadly to cover disputes "founded upon some incident of the employment relation . . . independent of those covered by the collective agreement." *Id.* at 303 (quoting *Burley*, 325 U.S. at 723). See pp. 17-20, *infra*.

B. The Hawaii Supreme Court was wrong to conclude that the standard for preemption of state law under the RLA is "virtually indistinguishable" from the rule for preemption under the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141-188, in *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). First, whereas the LMRA declares arbitration to be "the desirable method" for settling "disputes over the application or interpretation of an existing collective-bargaining agreement," 29 U.S.C. § 173(d), the category of arbitrable minor disputes under the RLA extends to grievances in addition to disputes over interpretation and application of agreements. Moreover, under the RLA arbitration is not just a "desirable method" for resolving labor disputes, but rather is mandated by Congress as the sole and exclusive means of resolving such disputes. Thus this Court has held that "the case for insisting on resort to [RLA arbitration] remedies is if anything stronger in cases arising under the [RLA] than it is in cases arising under . . .

the LMRA." *Andrews*, 406 U.S. at 323. While there is a split among the lower courts, the majority—including the Fourth, Sixth, Seventh, and Ninth Circuits—have recognized these differences between the RLA and LMRA and have refused to import the *Lingle* rule into the RLA context. See pp. 21-24, *infra*.

C. Recognition that the scope of RLA mandatory arbitration extends more broadly than just disputes over interpretation or application of collective agreements would not, as the Solicitor General's *amicus* brief contends (at 12), result in "an unduly broad preemption of state tort law." First, because preemption turns on Congress's intent, *Retail Clerks Int'l Ass'n* v. *Schermerhorn*, 375 U.S. 96, 103 (1963), and because Congress intended the RLA to reach more broadly than the LMRA, the resulting impact on state law cannot be deemed "undue." Second, RLA preemption of state retaliatory discharge claims would not be undue, and the cases cited by the Solicitor General for a contrary proposition are inapposite. See pp. 25-28, *infra*.

D. The rule advanced by the Hawaii Supreme Court would contravene the policies that led Congress to channel minor disputes to arbitration. First, by making preemption turn on fine points of substantive state tort law in inherently interstate industries, the rule would jeopardize uniformity and consistency in the resolution of railroad and airline grievances. See, *e.g.*, *Magerer* v. *John Sexton & Co.*, 912 F.2d 525, 529 (1st Cir. 1990) (finding that retaliatory discharge claims are preempted under Massachusetts law but not Illinois law). Second, the rule undermines the integrity of the RLA by allowing employees to artfully plead state tort claims and thereby "make an end run . . . avoiding the carefully crafted procedures set forth in the RLA." *DeTomaso* v. *Pan Am. World Airways, Inc.*, 733 P.2d 614, 621 (Cal. 1987), *cert. denied*, 484 U.S. 829 (1987). See pp. 29-30, *infra*.

ARGUMENT

I. THE RAILWAY LABOR ACT GIVES ADJUSTMENT BOARDS EXCLUSIVE JURISDICTION TO RESOLVE DISPUTES GROWING OUT OF THE EMPLOYMENT RELATIONSHIP BETWEEN CARRIERS AND EMPLOYEES.

A. Statutory Language.

The Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, governs employer-employee disputes in the rail and airline industries. It provides comprehensive procedures for peacefully resolving what are commonly referred to as "major" and "minor" disputes in accordance with the terminology adopted in *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 723 (1945), thereby avoiding interruptions of critically important segments of the Nation's interstate commerce.

The RLA's "major-dispute" procedures apply to "intended change[s] in agreements affecting rates of pay, rules, or working conditions." 45 U.S.C. § 156. The RLA provides that a carrier or union seeking to effect such a change must first serve notice on the other party, and that if agreement cannot be reached, the parties must exhaust a lengthy process of collective bargaining and mediation, followed, at the discretion of the President, by investigation and recommendations by an emergency board. See *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

Minor disputes are those that "grow[] out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153 First (i). If not settled by agreement of the parties, these disputes are resolved through arbitration before the National Railroad Adjustment Board ("NRAB") permanently established by § 3 First or before alternative adjustment boards created pursuant to § 3 Second. The RLA provides for appointment of a neutral board member to break deadlocks. 45 U.S.C.

§§ 153 First (f), 153 Second.[2] Employees have the right to be heard in grievance arbitration "either in person, by counsel, or by other representatives, as they may respectively elect," 45 U.S.C. § 153 First (j), and to proceed with their grievances on an individual basis even over the objection of the union. *Burley*, 325 U.S. at 740-41 & n.39. Consistent with the purposes of the RLA, unions and employees are prohibited from striking over a minor dispute, either before or after the decision by an adjustment board.[3]

This Court has repeatedly held that the jurisdiction of these adjustment boards to arbitrate minor disputes is exclusive and that courts lack subject-matter jurisdiction to decide the merits of any minor dispute.[4] Apart from limited statutory grounds for judicial review of arbitration awards, 45 U.S.C. § 153 First (p) and (q), the RLA makes no provision for judicial involvement in resolving minor disputes. In short, "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and *out of the courts.*" *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 94 (1978) (emphasis added) (citation omitted).

The RLA's language makes clear that the mandatory and exclusive minor dispute resolution procedures are not limited simply to claims "growing out of" the "interpretation or application" of collective bargaining agreements —an expansive category in itself—but also include claims "growing out of grievances." 45 U.S.C. § 153 First (i). Indeed, the RLA makes clear that one of its central

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[2] In the airline industry, minor disputes are resolved by adjustment boards established by the airline and the unions. 45 U.S.C. § 184. These boards are similar to the alternative adjustment boards established under § 3 Second, including provision for neutral members.

[3] *E.g.*, *Brotherhood of R.R. Trainmen* v. *Chicago River & I. R.R.*, 353 U.S. 30 (1957) (before); *Brotherhood of Locomotive Eng'rs* v. *Louisville & N. R.R.*, 373 U.S. 33 (1963) (after).

[4] *E.g.*, *Andrews* v. *Louisville & N. R.R.*, 406 U.S. 320 (1972); *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239 (1950).

purposes is "to provide for the prompt and orderly settlement of *all* disputes growing out of grievances *or* out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a (emphasis added). The broad range of disputes covered by the RLA is further evidenced by § 2 First of the Act, which requires carriers and their employees to "settle *all* disputes, whether arising out of the application of such [collective bargaining] agreements *or otherwise* . . . ." 45 U.S.C § 152 First (emphasis added). Thus, as this Court recognized nearly fifty years ago and confirmed in *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299, 303 (1989) (*"Conrail"*), the RLA covers not only claims that implicate the terms of written or implied collective agreements, but also claims that are "founded upon *some incident of the employment relation . . . independent of those covered by the collective agreement.*" *Conrail*, 491 U.S. at 303 (quoting *Burley*, 325 U.S. at 723) (emphasis added).[5]

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[5] *Conrail* affirmed, as the lower courts have long held, that collective bargaining agreements under the RLA "may include implied, as well as express, terms." 491 U.S. at 311. Thus, disputes over the "interpretation or application of agreements," as that language is used in § 3 of the RLA, may relate to terms implied from past practices as well as express agreement terms. Disputes "growing out of grievances," as that term also appears in § 3, relate to "incident[s] of the employment relation" other than those covered by implied or express agreements. See also pp. 9-10, *infra*. Because most disputes will in one way or another involve interpretation or application of implied terms, if not express ones, relatively few disputes fall within the residual category of "grievances." That does not mean that such disputes are something other than minor disputes, however. Accordingly, the lower courts have generally recognized that both interpretation/application disputes and other grievances are minor disputes, as this Court recognized in *Burley* and *Conrail*. See, *e.g.*, *Lorenz* v. *CSX Transp., Inc.*, 980 F.2d 263, 268 (4th Cir. 1992); *Air Line Pilots Ass'n* v. *Eastern Air Lines, Inc.*, 863 F.2d 891, 898-99 (D.C. Cir. 1988); *Railway Labor Executives Ass'n* v. *Atchison, T. & S.F. Ry.*, 430 F.2d 994, 996-97 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971). *Davies* v. *American Airlines, Inc.*, 971 F.2d 463, 467-68 (10th Cir. 1992), *cert. denied*, 113 U.S. 2439 (1993), is to the contrary, but that court—like the Hawaii Supreme Court—was under what we believe to be the mistaken impression that *Burley's* broader definition had been "overruled by *Conrail*." See pp. 17-20, *infra*.

This broad definition of minor disputes is compelled not only by the statutory language but also by the policies that led Congress to create "expert administrative Board[s]" familiar with "specialized" industry custom and practice and railroad and airline collective bargaining agreements. *Pennsylvania R.R.* v. *Day*, 360 U.S. 548, 551, 553 (1959).[6] Thus, Congress provided for mandatory arbitration of workplace grievances by "representatives of management and labor . . . peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world." *Gunther* v. *San Diego & A.E. Ry.*, 382 U.S. 257, 261 (1965) (citation omitted); see also *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239, 243 (1950) (board members "understand railroad problems and speak the railroad jargon"; "[l]ong and varied experiences have added to the Board's initial qualifications").

B. Legislative History.

The legislative history of the RLA confirms Congress's intent to encompass within its scope all disputes growing out of the employment relationship between rail and air carriers and their employees. The RLA was originally enacted in 1926. 44 Stat. 577. During the debates on the 1926 legislation, minor disputes were sometimes characterized by its sponsors as involving the interpretation of existing labor agreements, in order to contrast them with "major disputes," *i.e.*, disputes over the formation of such agreements (which are subject to different RLA

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[6] As this Court has observed, " 'The railroad world is like a state within a state. Its population . . . has its own customs and its own vocabulary, and lives according to rules of its own making.' " *Whitehouse* v. *Illinois Cent. R.R.*, 349 U.S. 366, 371 (1955) (quoting Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 568-69 (1937)).

processes).[7] But the same speakers emphasized that minor disputes were not limited solely to contractual questions. To the contrary, as explained by Representative Barkley, one of the supporters of the House bill, the adjustment boards were designed to consider "disagreements over grievances, interpretations, discipline, and other technicalities that arise from time to time in the workshop and out on the tracks in the operation of the roads." RLA Leg. Hist. 210, *supra* note 7. Similarly, Senator Watson, a proponent of the Senate bill, stated that minor disputes include "what are ordinarily called grievances" (which could be "of a personal nature" and involve a "great many employees," "a few employees," or "but one employee"), and "*also*, . . . disputes rising out of the interpretation and application of existing agreements as to wages, hours of labor, or working conditions." *Id.* at 477 (emphasis added). In short, from the very beginning Congress intended the full range of disputes arising "in the workshop and out on the tracks"—even if "of a personal nature" and involving but a single person (and not involving interpretation or application of an express or implied agreement)—to be subject to the regime of the RLA.

The legislative history also confirms Congress's purposes for channeling such a broad range of disputes to the adjustment processes. First, Congress wanted disputes to be resolved by individuals who "understand the problems by reason of their technical knowledge of the industry." RLA Leg. Hist. at 176 (statement of Rep. Cooper). Second, Congress adopted the position, which was urged by both the unions and the railroads, that the absence of outside interference in resolving these disputes was the means "best adapted to maintain satisfactory relations between

[7] See, *e.g.*, Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., Legislative History of the Railway Labor Act, As Amended (1926 through 1966) 192, 205, 480 (Comm. Print 1974) [hereinafter cited as "RLA Leg. Hist."] (statements of Rep. Barkley and Sen. Watson).

employers and employees."[8] As Representative Barkley explained, "[t]he history of railroading in this country has demonstrated that the most satisfactory method of adjustment of *all railroad disputes involving labor and working conditions* has been when . . . both sides were permitted to sit down at a table and settle their own disputes without interference from the outside." RLA Leg. Hist. at 194 (emphasis added).[9]

Finally, the legislative history surrounding amendments to the Act in 1934 and 1966 reaffirm Congress's intent to insulate disputes between carriers and employees from outside interference. The 1934 amendments were designed to make the grievance-resolution process more effective by creating a permanent NRAB (whereas before the Act provided for boards by agreement, which was not always possible, see *Burley*, 325 U.S. at 725-26), and by establishing a procedure for breaking deadlocked votes (which had led to a backlog of unresolved claims, see *Union Pac. R.R.* v. *Price*, 360 U.S. 601, 611-12 (1959)). These two amendments were advocated strongly by the unions, whose leaders made clear that "[*t*]*he employees were willing to give up their remedies outside of the statute* provided that a workable and binding statutory scheme was established to settle grievances." *Union Pac. R.R.* v. *Price*, 360 U.S. at 613 (emphasis added).[10] Likewise,

[8] H.R. Rep. No. 328, 69th Cong., 1st Sess. (1926), RLA Leg. Hist. at 48; S. Rep. No. 606, 69th Cong., 1st Sess. (1926), RLA Leg. Hist. at 102.

[9] That this mandate extended beyond the realm of simply interpreting contracts is evident in the comments of Rep. Crosser, who said that adjustment boards would, along with the other boards established under the Act, "serve in a manner as courts to determine who is right and who is wrong, what is just and what is unjust, in disputes between railroads and their employees," and thus prevent them from becoming "tyrants" over each other. RLA Leg. Hist. at 344.

[10] To be sure, and as pointed out by the Solicitor General's *amicus* brief last Term in *American Airlines, Inc.* v. *Davies* (No. 92-1077), *cert. denied*, 113 S. Ct. 2439 (1993) (at 6 n.5), the legislative history to the 1934 amendments does include a statement in a discussion of a non-related issue in a House Report that the

when the Act was amended in 1966 to incorporate a narrow standard for judicial review of arbitration awards, labor unions again offered vigorous support because, as one union spokesman explained, "[i]f the objectives of speedy, fair, and simplified handling and settlement of contract claims and grievances in this industry are to be achieved, it will be done by reducing to a minimum, rather than by expanding, the role of the courts in the field." [11]

C. Supreme Court Cases.

This Court's decisions confirm what the RLA's language and purpose compel—that the scope of the Act's coverage, and hence of its mandatory arbitral processes, extends beyond disputes over the interpretation of labor agreements to encompass all varieties of workplace grievances arising out of the employment relationship. In its landmark *Burley* decision, this Court stated that "so-called minor disputes" involve "grievances . . . which

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bill "provide[s] sufficient and effective means for the settlement of minor disputes known as 'grievances,' which develop from the interpretation and/or application of the contracts between labor unions and the carriers, fixing wages and working conditions." H.R. Rep. No. 1944, 73d Cong., 2d Sess. 2-3 (1934). That single statement, however, cannot justify equating "grievances" with contract interpretation disputes in a way that deprives the statutory reference to "grievances" of all meaning, contrary to the many statements by the Act's original sponsors, set forth above, making clear that the statutory coverage of disputes "arising out of grievances *or* out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" was meant to encompass a broader class of disputes than just those arising from interpretation or application of collective agreements. Indeed, the 1934 House Report stated as to section 2, which incorporated the above-quoted statutory language, that "[t]he bill does not introduce any new principles into the existing Railway Labor Act." *Id.* at 2, 6.

[11] *Railway Labor Act Amendments Relating to NRAB: Hearings on H.R. 701, H.R. 704, and H.R. 706 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 262 (1965) (statement of Jesse Clark on behalf of Railway Labor Executives' Association).

inevitably appear in the carrying out of [collective bargaining] agreements and policies or arise incidentally in the course of an employment," including claims "founded upon some incident of the employment relation . . . independent of those covered by the collective agreement." 325 U.S. at 723-24. This Court has also held that the NRAB "was established as a tribunal to settle disputes *arising out of the relationship* between carrier and employee, and that "[t]he purpose of the Act is fulfilled *if the claim itself arises out of the employment relationship.*" *Pennsylvania R.R.* v. *Day*, 360 U.S. 548, 551-52 (1959) (emphasis added). And this Court has stated that "minor disputes" cover the broad range of "grievances that arise daily between employees and carriers regarding rates of pay, rules, and working conditions." *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 94 (1978).

Most recently in *Conrail*, this Court pointed out that "the minor dispute category is predicated on § 2 Sixth and § 3 First (i) of the RLA, which set forth conference and compulsory arbitration procedures for a dispute arising or growing 'out of grievances or out of the interpretation or application of [collective bargaining] agreements.'" 491 U.S. at 303. Quoting *Burley*, the Court explained that a minor dispute "relates either to the meaning or proper application of a particular provision . . . *or* to an omitted case" in which "the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement." *Id.* (emphasis added).

This Court's decisions also make clear that if a dispute is a minor dispute, then RLA arbitration is the exclusive remedy and resort to a judicial forum—including under state law—is foreclosed. This Court has specifically found in the RLA "a denial of power in any court—*state as well as federal*—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act." *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239, 244 (1950) (emphasis added). As the Court held in *Pennsylvania R.R.* v. *Day*, 360 U.S. at 553, "not to respect the cen-

tralized determination of these questions through the Adjustment Board would hamper if not defeat the central purpose of the Railway Labor Act." And in *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320, 322 (1972), then-Justice Rehnquist, writing for a majority of the Court, held that an employee could not bring a state-law wrongful discharge claim in state court because the case presented a minor dispute: "[T]he notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law." [12]

D. Arbitration of Retaliatory Discharge Claims.

With respect to "whistleblower" claims of the type at issue in this case, Congress has passed legislation confirming its intent that these claims be resolved solely by RLA arbitrators. The Federal Railroad Safety Act ("FRSA"), 45 U.S.C. § 431 *et seq.*, provides that a railroad may not "discharge or in any manner discriminate against" an employee who has filed a complaint or instituted a proceeding related to the enforcement of the federal railroad safety laws (or who has or is about to testify in such a proceeding). 45 U.S.C. § 441(a). The statute further provides: "*Any dispute, grievance, or claim arising under this section shall be subject to resolution in accordance with the procedures set forth in section 153 of this title* [*i.e.*, the RLA grievance arbitration process]." *Id.* § 441(c) (emphasis added). The legislative history confirms that this language was intended to foreclose remedies other than RLA arbitration.[13] The NRAB and

[12] The sweep of the *Andrews* decision is evident from the dissent of Justice Douglas, who recognized (and criticized) the majority holding that "Congress has vested the Board with jurisdiction to entertain nonreinstatement grievances such as Andrews' complaint." *Id.* at 331-32 (Douglas, J., dissenting).

[13] See H.R. Rep. No. 1025, 96th Cong., 2d Sess. 8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3830, 3832 ("The protections provided . . . would be enforced solely through the existing grievance procedures provided for in Section 3 of the Railway Labor Act, including the Adjustment Board, its divisions, and the 'Public Law Boards'."); *id.* at 3841 ("The Committee intends this to be the exclusive means for enforcing this section.").

other RLA adjustment boards have handled many claims alleging precisely the sort of retaliatory discharge claims advanced in this case.[14]

The FRSA did not *add* to the scope of the disputes subject to the RLA's mandatory processes. Rather, the legislative history of the FRSA confirms that Congress believed that retaliatory discharge claims were already included in the mandatory RLA arbitration framework as it existed prior to enactment of the FRSA. The House Committee Report stated that

> "rail employees already receive similar protection, along with backpay, through the grievance procedure. *The Committee does not intend to alter the existing protection, but rather to put the prohibition of discrimination into statutory form.*" H.R. Rep. No. 1025, 96th Cong., 2d Sess. 16 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3830, 3840 (emphasis added).

[14] Public Law Board No. 3399, Award No. 4 (Mar. 11, 1985), at 6 (upholding grievance because suspension from service was "transparently retaliatory"); NRAB First Division Award No. 24059 (Feb. 6, 1991), at 1-2 (addressing claim that employee was discharged in retaliation for "comment and complaint of violations of safe operating procedures"); NRAB Second Division Award No. 12148 (Sept. 25, 1991), at 2 (addressing grievance that railroad had discharged employee in retaliation "for his having spoken to reporters on matters of public safety and concern" following dismissal of retaliatory discharge state-law tort suit); see also NRAB Third Division Award No. 27505 (Sept. 22, 1988) (addressing claim that employee "was constructively discharged when he was unwilling to perform allegedly felonious acts"); Public Law Board No. 4269, Award No. 300 (Sept. 25, 1990), at 1, 6 (addressing claim of harassment in retaliation "for reporting unsafe conditions and practices"); NRAB Third Division Award No. 28725 (Mar. 28, 1991), at 1, 9-10 (addressing grievance that employees had been subjected to discipline and harassment in retaliation for testimony to Federal Railroad Administration concerning safety matters); NRAB Third Division Award No. 23151 (Jan. 30, 1981), at 1, 6-7 (addressing grievance that employee had been dismissed in retaliation for "disloyalty" to the railroad).

Senator Cannon summarized the Senate Committee's views:

> "The Senate committee recognizes that under current law rail employees . . . can seek similar protection through normal grievance procedures established under section 3 of the Railway Labor Act. This subsection is intended to codify the protection granted pursuant to those procedures by the law boards and panels. It is important to note in this regard that any grievance under this section is subject to the procedures set forth in section 3 of the Railway Labor Act." 126 Cong. Rec. S13337 (daily ed. Sept. 24, 1980) (statement of Sen. Cannon).

In short, Congress recognized that "whistleblower" claims were squarely within the ambit of mandatory RLA arbitration before passage of the FRSA.[15] This acknowledgement is especially significant because it demonstrates that "whistleblower" claims in the airline industry, which is not subject to the FRSA, also fall within the scope of mandatory RLA arbitration.

As the Fourth Circuit has held, Congress's express provision of an exclusive arbitral remedy for these types of retaliatory discharge and discipline claims leaves no room for state-law tort suits based thereon. *Rayner* v. *Smirl*, 873 F.2d 60, 64-66 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989). The Fourth Circuit's decision exhibits sensitivity to the concerns of expertise and uniform resolution that led Congress to refer minor disputes to arbitration in the first instance:

> "[A] claim of wrongful discharge for 'whistleblowing' is inextricably tied to the question of precisely what

[15] Congress's understanding was clearly correct; thus, long before the FRSA was passed the Fifth Circuit had held that employees claiming that the carrier had failed to accord them safe working conditions must "submit their grievances in that regard to the National Railway Adjustment Board for adjustment," even if the collective agreement was silent on the matter. *Missouri-K.-T. R.R.* v. *Brotherhood of R.R. Trainmen*, 342 F.2d 298, 300 (5th Cir. 1965).

> . . . safety practices he was blowing the whistle on. To the extent that the justifiable nature of the whistleblowing enters the calculus in wrongful discharge actions, . . . safety laws might be subject to an unpredictable medley of jury determinations, which Congress, in its quest for national uniformity . . . sought to avoid." *Rayner*, 873 F.2d at 66.

Applying that logic to this case would require reversal of the Hawaii Supreme Court's decision.

II. THE HAWAII SUPREME COURT'S PREEMPTION RULE LACKS FOUNDATION EITHER IN THE RLA OR THIS COURT'S PRECEDENTS AND WOULD CONTRAVENE THE RLA'S POLICIES.

A. The Hawaii Supreme Court Misread Conrail.

The Hawaii Supreme Court fully understood that "[m]andatory arbitration is the exclusive remedy for claims arising from minor disputes." Pet. App. 12a. For the Hawaii Supreme Court, the crucial question was "whether Norris' claims may be deemed 'minor,' thereby preempting his state tort action and requiring him to submit to mandatory arbitration pursuant to the RLA." *Id.* The Court concluded that respondent's retaliatory discharge claim is not a minor dispute, and thus not preempted by the RLA, because it "is not dependent on an interpretation of [the collective bargaining agreement]." Pet. App. 14a, 20a. The sole support for that holding was the Hawaii Supreme Court's reading of this Court's decision in *Conrail* as holding that " 'minor' disputes, to which § 153 First (i) applies, are those that 'may be conclusively resolved by interpreting the existing [collective bargaining] agreement.' " Pet. App. 14a (quoting *Conrail*, 491 U.S. at 305).[16]

The Hawaii Supreme Court correctly quoted, but plainly misunderstood, this Court's holding in *Conrail*.

[16] The Hawaii Supreme Court conceded that the statutory term "grievances" could be read to sweep more broadly, but concluded that this Court had "clearly determined otherwise in" *Conrail*. Pet. App. 14a.

That case was not concerned with RLA preemption of state law. Rather, the Court's purpose in *Conrail* was to "articulate[] an explicit standard for differentiating between major and minor disputes," 491 U.S. at 302, a distinction that is important because the RLA provides for entirely different procedures depending on whether a dispute is major or minor. See p. 6, *supra*. The problem faced by the Court in *Conrail* was that often a carrier would introduce a practice claiming a contractual right to take that action; conversely, the union would assert that the carrier was in fact unilaterally changing an existing agreement, thereby creating a major dispute. See 491 U.S. at 302. Writing for the majority in *Conrail*, Justice Blackmun resolved that internal RLA issue as follows:

> "*Where an employer asserts a contractual right* to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major." 491 U.S. at 307 (emphasis added).

Therefore, the above-quoted language relied upon by the Hawaii Supreme Court appeared in the context of addressing the RLA's internal major/minor dispute distinction where a carrier claims contractual justification. Rather than touching at all on the RLA's reach with respect to other bodies of law, that language simply buttressed this Court's subsidiary conclusion that "the formal demarcation between major and minor disputes does not turn on a case-by-case determination of the importance of the issue presented or the likelihood that it would prompt the exercise of economic self-help." 491 U.S. at 305. Thus, the Court went on to assert that "the line drawn in *Burley* [between major and minor disputes] looks to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action," and thus that "[t]he distinguishing feature of *such a case* is

that the dispute may be conclusively resolved by interpreting the existing agreement." *Id.* (emphasis added).[17]

Although *Conrail* focused on the RLA's internal major/minor distinction where a party relies on the contract, that case was far from silent with respect to the general scope of the RLA's mandatory arbitration provisions. The portions of Justice Blackmun's opinion relating to that issue demonstrate the Court's intention to *preserve* rather than restrict Congress's broad statutory coverage of disputes "growing out of grievances" as well as those involving "interpretation or application of collective bargaining agreements." In particular, *Conrail* expressly recognized and quoted *Burley*'s long-standing explanation that RLA minor disputes include an "omitted case" "founded upon some incident of the employment relation . . . independent of those covered by the collective agreement." 491 U.S. 303 (quoting *Burley*, 325 U.S. at 723).[18]

There is further indication in *Conrail* that this Court did not intend to cut back on the scope of the RLA's

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[17] A test for distinguishing between major and minor disputes is not useful to determine whether an individual grievance is a minor dispute. As noted above, minor disputes are subject to arbitration, while major disputes involve a lengthy process of collective bargaining and mediation between the union and the carrier. Because major disputes are essentially collective in nature and call for collective resolution, individual grievances of the type at issue here are not susceptible of characterization as major disputes. Because the grievance here was clearly not "major," there was no point in applying the *Conrail* test for distinguishing between "major" and "minor" disputes in this case.

[18] In *Daniels* v. *Burlington N. R.R.*, 916 F.2d 568, 572 (9th Cir. 1990), *vacated upon settlement*, 962 F.2d 960 (9th Cir. 1992), the Ninth Circuit quoted this language in *Conrail* to *reject* an argument that an employment dispute was "not a 'grievance' under the RLA" because it did not "involve or arise out of the application or interpretation of a collective bargaining agreement." See also *Verdon* v. *Consolidated Rail Corp.*, 828 F. Supp. 1129, 1136 (S.D.N.Y. 1993) (quoting *Conrail* and finding employee's claim was a minor dispute because it was " 'founded upon' . . . an 'incident of the employment relation' ").

coverage. Immediately following the language upon which the Hawaii Supreme Court relied, this Court suggested that a reader "See Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L.J. 567, 568, 576 (1937)." 491 U.S. at 305. Dean Garrison made clear in that article that "[q]uestions of discipline or refusal to promote (constituting 'grievances') are reviewable by the Board . . .." 46 Yale L.J. at 586. Thus, at an early point following the creation of the NRAB in 1934 he considered discipline (and promotion cases) as those that may give rise to the jurisdiction of the NRAB under the category of "grievances," rather than under the category arising out of the interpretation or application of agreements.[19] As we have shown above, the legislative history of the RLA is in square accord with this reading of *Conrail*. See pp. 9-12, *supra*.[20]

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[19] See also First Annual Report of the National Mediation Board 40 (1935) (Adjustment Board had adjudicated 15 cases of "complaints of improper discipline").

[20] We note that even if the *Conrail* language relied upon by the Hawaii Supreme Court were applicable in the preemption context, the dispute in this case would still qualify for preemption because it is one that "*may* be conclusively resolved by interpreting the existing agreement." 491 U.S. at 305 (emphasis added). That is so, among other reasons, because Article XVII of the agreement in this case prohibits disciplinary action for "refusal to perform work which is in violation of established health and safety rules, or any local, state or federal health and safety law." Pet. App. 60a-61a. An RLA arbitrator's interpretation of that provision "may . . . conclusively resolve" the dispute in this case because it could result in a finding that Norris was or was not disciplined in retaliation for reporting a safety violation. The Hawaii Supreme Court's conclusion that Article XVII did not apply to Norris' dispute, on the ground that the provision related to the safety of the workplace rather than the safety of the public, Pet. App. 20a, was itself an impermissible judicial interpretation of the collective agreement.

B. The Hawaii Supreme Court's Misreading of *Conrail* Undermines its Analogy to *Lingle*.

As we have just shown, the Hawaii Supreme Court misread *Conrail* as restricting the category of minor disputes—and thus the coverage of the RLA mandatory arbitration provisions—to disputes which can be "conclusively resolved by interpreting the existing [collective bargaining] agreement." Pet. App. 14a. Based on this misreading of *Conrail*, the Hawaii Supreme Court thought that the scope of the definition of a minor dispute—and thus of mandatory and exclusive RLA arbitration—was "virtually indistinguishable" from the rule set forth in *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). *Lingle* held that state law tort claims are not preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141-188, unless an element of the claim "requires a court to interpret [a] term of a collective-bargaining agreement." Pet. App. 16a (quoting *Lingle*, 486 U.S. at 407). Thus, while acknowledging that "all parallels between the RLA and the LMRA must be drawn 'with utmost care,'" Pet. App. 14a (quoting *Chicago & N.W. Ry.* v. *United Transp. Union*, 402 U.S. 570, 579 n.11 (1971)), the Hawaii Supreme Court held that "Congress intended the mandatory arbitration provision of the RLA be confined to the same limits the Supreme Court applied to the LMRA in *Lingle*." Pet. App. 17a.

As we have shown above, however, the rule under the RLA is that the category of minor disputes subject to mandatory arbitration includes disputes "growing out of grievances" about the employment relationship in addition to disputes about interpretation of collective bargaining agreements. This rule is *not* "virtually indistinguishable" from the rule in *Lingle*, as the Hawaii Supreme Court held; on the contrary, it differs from the rule in § 301 arbitration cases with respect to precisely those limits on the scope of § 301 arbitration on which *Lingle* was predicated. Thus there is no sound basis for

the Hawaii Supreme Court's logic that *Lingle* applies because *Conrail* calls for essentially the same rule.[21]

In fact, there are major differences between the RLA and the LMRA that mandate broader preemption under the RLA than the *Lingle* rule provides under the LMRA. The National Labor Relations Act, as amended and supplemented by the LMRA, does not provide for or require arbitration of any disputes. It does state that "[f]inal adjustment by a method agreed upon by the parties is declared to be the *desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.*" 29 U.S.C. § 173(d) (emphasis added). Also, section 301 gives district courts jurisdiction over "[s]uits for *violation of contracts* between an employer and a labor organization," 29 U.S.C. § 185(a) (emphasis added), and thus to enforce agreements to arbitrate such disputes.[22] That mere endorsement or encouragement of arbitration was held in *Lingle* to be sufficient to preempt state tort law that intrudes upon its scope as so restricted. 486 U.S. at 411.

In contrast with the LMRA, arbitration is not merely a "desirable method" for resolving disputes under the RLA; instead, it is *mandated* by Congress. Accordingly, this Court has recognized that "the case for insisting on resort to [RLA arbitration] remedies is if anything stronger in cases arising under the [RLA] than it is in cases arising under § 301 of the LMRA." *Andrews*, 406 U.S. at 323. Moreover, unlike the LMRA, the RLA's mandatory arbi-

[21] Even if the Hawaii Supreme Court's interpretation of *Conrail* were to apply in the preemption context, that standard is not "virtually indistinguishable" from *Lingle*. We have shown that the dispute in this case "may be conclusively resolved by interpretation of the existing agreement," see note 20, *supra*, even if a similar dispute in *Lingle* was held not to have "require[d] a court to interpret [a] term of a collective-bargaining agreement."

[22] See, *e.g.*, *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 220 (1985); *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 567-68 (1960).

tration extends to disputes "growing out of grievances" in addition to disputes over interpretation or application of agreements. See pp. 6-8, *supra*.[23]

In light of these differences in the statutory language and purposes, the Fourth, Sixth, Seventh, and Ninth Circuits have refused to import the rule in *Lingle* into the RLA context. *Underwood* v. *Venango River Corp.*, 995 F.2d 677, 682 (7th Cir. 1993) (holding that "[t]he Supreme Court's decisions in *Lingle* and *Andrews* support the position that preemption under the RLA is broader than preemption under the LMRA"); *Lorenz* v. *CSX Transp., Inc.*, 980 F.2d 263, 268 (4th Cir. 1992) (contrasting scope of disputes subject to arbitration under RLA and NLRA); *Grote* v. *Trans World Airlines, Inc.*, 905 F.2d 1307, 1309 (9th Cir. 1990) ("The preemption created under the RLA and that arising under § 301 of the LMRA are not analogous."); *Smolarek* v. *Chrysler Corp.*, 879 F.2d 1326, 1334-35 n.4 (6th Cir.) (citing with approval a pre-*Lingle* RLA preemption case applying different standard), *cert. denied*, 493 U.S. 992 (1989); see *Calvert* v. *Trans World Airlines, Inc.*, 959 F.2d 698, 700 (8th Cir. 1992) (refusing to analogize from "outrageous conduct" exception to LMRA preemption).[24] In

[23] The Solicitor General's *amicus* brief in support of certiorari recognizes (at 15) that *Lingle* does not apply under the RLA, but deems the *Lingle* analysis "instructive" on the question of how to "accommodate the federal interest in uniform interpretation of collective bargaining agreements and the legitimate interest of the States in adopting standards of conduct for employers subject to their police power." However, the "accommodation" reached in *Lingle*, *i.e.*, that disputes are preempted when they require interpretation of agreements, is inconsistent with the language and policies of the RLA, where Congress mandated arbitration for a wider variety of disputes than those for which it suggested arbitration under the LMRA—only those involving contract interpretation.

[24] The Second and Third Circuits have suggested that RLA preemption might be broader but have not had occasion to decide whether it must be so in this particular context. *Pennsylvania Fed'n of Bhd. of Maintenance of Way Employees* v. *Amtrak*, 989 F.2d 112, 115 n.7 (3d Cir.) (applying *Lingle* to find preemption

other cases as well, the appellate courts have referred to differences in the purposes of the statutes to find the RLA's scope broader.[25]

but observing RLA may be broader), *cert. denied*, 114 S. Ct. 85 (1993); *Baylis* v. *Marriott Corp.*, 906 F.2d 874, 878 (2d Cir. 1990), *citing with approval Baldracchi* v. *Pratt & Whitney Aircraft Div.*, 814 F.2d 102, 106 (2d Cir. 1987) ("RLA likely has greater preemptive reach than LMRA"), *cert. denied*, 486 U.S. 1054 (1988). The First Circuit has found preemption using an analysis similar to *Lingle*, but added that "to allow state law claims *arising out of the employment relation*" to be brought in court would "undermine the scheme for labor dispute resolution" and the "purposes behind the RLA." *O'Brien* v. *Consolidated Rail Corp.*, 972 F.2d 1, 4 (1st Cir. 1992) (emphasis added), *cert. denied*, 113 S. Ct. 980 (1993). The two federal circuits that have rejected RLA preemption using the *Lingle* analysis did so based on the narrow reading of *Conrail* discussed above, from which they concluded, like the Hawaii Supreme Court, that the RLA's coverage is no different from the coverage of the LMRA and the preemption analysis is therefore the same. *Anderson* v. *American Airlines, Inc.*, 2 F.3d 590, 595-96 (5th Cir. 1993); *Davies* v. *American Airlines, Inc.*, 971 F.2d 463, 468 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993); see also *Maher* v. *New Jersey Transit Rail Operations, Inc.*, 593 A.2d 750 (N.J. 1991); *IAM* v. *Allegis Corp.*, 545 N.Y.S.2d 638 (N.Y. Sup. Ct. 1989) (applying *Lingle* to RLA).

[25] See, *e.g.*, *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045, 1052 (7th Cir 1983) ("It follows . . . that a state claim is more likely to impinge on an area of exclusive administrative jurisdiction under the RLA than under the NLRA."), *cert. denied*, 465 U.S. 1007 (1984); *Hubbard* v. *United Air Lines*, 927 F.2d 1094 (9th Cir. 1991) (preemption broader under RLA); *Peterson* v. *Air Line Pilots Ass'n*, 759 F.2d 1161, 1169 (4th Cir.) ("Unlike preemption under the NLRA, the preemption of state law claims under the RLA has been more complete."), *cert. denied*, 479 U.S. 946 (1985); *Gonzalez* v. *Prestress Eng'g Corp.*, 503 N.E.2d 308, 313 (Ill. 1986) (case denying preemption under RLA was "clearly inapposite" to section 301 analysis), *cert. denied*, 483 U.S. 1032 (1987); *Brown* v. *Missouri Pac. R.R.*, 720 S.W.2d 357, 359 n.5 (Mo. 1986) (en banc) (NLRA "is much less impacting than" RLA), *cert. denied*, 481 U.S. 1049 (1987). But see, *e.g.*, *Sabich* v. *National R.R. Passenger Corp.*, 763 F. Supp. 989, 992-93 (N.D. Ill. 1991) (holding *Lingle* standard applied in RLA context); *Elliott* v. *Consolidated Rail Corp.*, 732 F. Supp. 954, 957 (N.D. Ind. 1990) (applying *Lingle*-type analysis in RLA context without addressing differences between RLA and LMRA).

C. The Additional Cases Cited by the Solicitor General Do Not Support Narrow Preemption Under *Conrail/Lingle*.

In his *amicus* brief supporting *certiorari* (at 12), the Solicitor General advances an argument not made in the Hawaii Supreme Court's opinion—that failure to limit the coverage of the RLA's mandatory arbitration provisions would result in "an unduly broad preemption of state tort law, in contravention of this Court's precedents." We observe, as an initial matter, that in the preemption inquiry "[t]he purpose of Congress is the ultimate touchstone," *Retail Clerks Int'l Ass'n, Local 1625* v. *Schermerhorn*, 375 U.S. 96, 103 (1963), not what the impact of Congress's intended preemption will be. If Congress intended the coverage of the RLA's mandatory arbitration provisions to reach broadly (as shown above, pp. 6-17, *supra*), that intention is not altered by an Executive Branch value judgment that the resulting preemption of state law is "undue."

Indeed, the preemption of state law that would result from giving effect to Congress's intent to encompass disputes "growing out of grievances" within the RLA's mandatory processes would *not* be "undue." After all, *Lingle* and its progeny provide a strong rule of preemption of state-law tort claims involving interpretation of agreements, which is the limit of the LMRA's statutory reach. 486 U.S. at 411 (such claims are "firmly in the arbitral realm").[26] It should not be surprising that Con-

[26] Lower courts following *Lingle* have held any number of state tort claims preempted by the NLRA. See, *e.g.*, *Mock* v. *T.G. & Y. Stores Co.*, 971 F.2d 522, 530 (10th Cir. 1992) (claims for intentional infliction, fraud, invasion of privacy, defamation, false imprisonment, and conversion arising out of discipline investigation preempted because "[a]n analysis of whether T.G. & Y. acted properly or not will inevitably require an analysis of what the CBA permitted"); *McCormick* v. *AT&T Technologies, Inc.*, 934 F.2d 531, 537 (4th Cir. 1991) (claims for intentional infliction, conversion, and negligence preempted because "[m]anagement simply could not have acted negligently or wrongfully if it acted in a manner contemplated by the collective bargaining agreement"), *cert. denied*,

gress intended a broader scope of preemption in the railroad (and airline) industries, where a "lasting history of pervasive and uniquely-tailored congressional action indicates Congress's general intent that [they] should be regulated primarily on a national level through an integrated network of federal law." *R.J. Corman R.R.* v. *Palmore*, 999 F.2d 149, 152 (6th Cir. 1993); see *United Transp. Union* v. *Long Island R.R.*, 455 U.S. 678, 687 (1982) (noting that "[r]ailroads have been subject to comprehensive federal regulation for nearly a century").[27]

The preemption of state law at issue here would not, as the Solicitor General says (at 12), "contraven[e] . . . this Court's precedents." The Solicitor General mainly relies on *Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U.S. 714, 724 (1963), in which this Court held that nothing in federal law, including the RLA, preempted enforcement of a state law forbidding discrimination in hiring. The Court did not discuss preemption by reason of arbitral jurisdiciton over

112 S. Ct. 912 (1992); *Jackson* v. *Liquid Carbonic Corp.*, 863 F.2d 111, 119 (1st Cir. 1988) (statutory invasion of privacy claims could "only be resolved by deciding whether the employer's conduct was 'reasonable' under the labor contract"), *cert. denied*, 490 U.S. 1107 (1989).

[27] The Solicitor General overstates the likely preemptive effect of including employment-related "grievances" within the RLA's scope, in addition to disputes over interpretation or application of collective agreements. Because collective labor agreements include implied agreements from past practices, as the Solicitor General acknowledges (at 12 n.9), most RLA minor disputes *do* involve "application or interpretation" of implied, if not express, agreement terms. See note 5, *supra*. Such disputes would be preempted even if the *Lingle* standard were applied in the RLA context. The chief effect of not applying the *Lingle* rule in the RLA context, thus, would be preemption of retaliatory discharge claims, which are "grievances" but were held in *Lingle* (at least under Illinois law) not to require interpretation of the collective agreement. 486 U.S. at 406-07. Based on Congress's clear intent to commit railroad and airline retaliatory discharge claims to RLA arbitration, see pp. 14-17, *supra*, preemption of these claims, at least, would not be "undue."

RLA grievances, and insofar as appears that was not an issue in the case.[28]

In any event, there is certainly no need to decide in this case whether preemption of a state-law claim for retaliatory discharge, which Congress clearly intended to be encompassed within RLA mandatory arbitration, see pp. 14-17, *supra*, would also affect claims by employees for wrongful discharge by reason of racial or other discrimination prohibited by a state civil rights law. That issue is not presented here and involves considerations not present in this case. For example, Title VII of the Civil Rights Act of 1964 contains provisions for allocating enforcement functions between federal and state authorities where state or local laws address the "unlawful employment practice" at issue. 42 U.S.C. § 2000e-5(c) through (f). It may be that preemption of such a state discrimination statute involves issues similar to those raised by accommodation of the RLA with Title VII itself.[29]

Finally, preemption of retaliatory discharge claims does not mean that arbitrators could (much less that they would) run roughshod over paramount public policies. An arbitration award is unenforceable by the courts if that "would violate 'some explicit public policy' that is 'well defined and dominant,' and is to be ascertained 'by

[28] This is understandable because that jurisdiction is limited to disputes between "an employee or group of employees and a carrier or carriers," 45 U.S.C. § 153 First (i), and thus does not apply to disputes growing out of applications for employment, such as the dispute in that case. See 45 U.S.C. §§ 151 Fifth, 181 (defining "employee' for purposes of the RLA).

[29] The Court addressed an analogous situation in *Atchison, T. & S.F. Ry.* v. *Buell*, 480 U.S. 557 (1987). There, the Court accommodated the seemingly conflicting provisions in two *federal* statutory schemes, *i.e.*, the RLA and the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, by holding that Congress, by enacting these statutes, intended that a railroad employee may bring suit for a personal injury cognizable under the FELA even though a grievance over the events at issue could also be pursued under the RLA. *Id.* at 564.

references to the laws and legal precedents . . . .'" *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 43 (1987) (quoting *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983)). But, as the Court also held in *Misco*, such public policy review does not permit the courts to engage in factfinding as that is "the arbitrator's task." 484 U.S. at 44-45. Although *Misco* concerned arbitration under the NLRA, the lower courts have held "that arbitration awards under the [RLA] are subject to public policy review" with the same limits on such review (which include "observing the Railway Labor Act's proscription against judicial factfinding"). *Union Pac. R.R.* v. *United Transp. Union*, 3 F.3d 255, 260-61, 264 (8th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3471 (1994).[30] In allowing Norris to short circuit the grievance procedure, the Hawaii Supreme Court has circumvented these limitations on public policy review of arbitration awards, including the factfinding function of the arbitrator.[31]

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[30] Accord, *Delta Air Lines* v. *Air Line Pilots Ass'n*, 861 F.2d 665, 669-71 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989); see *Northwest Air Lines* v. *Air Line Pilots Ass'n*, 808 F.2d 76, 83-84 (D.C. Cir. 1987) (pre-*Misco*).

[31] The Solicitor General also expresses concern (at 13) that "arbitrators would be required to adjudicate issues of state tort law," citing *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53 (1974) and *Gilmer* v. *Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991). The Solicitor General speculates (at 13 n.10) that *Alexander* would prohibit arbitrators from adjudicating such issues, and that this Court's forum-selection ruling in *Gilmer* (which held that a federal age discrimination claim had to be resolved by an arbitrator rather than a court, 111 S. Ct. at 1652) would not apply. Because this case involves preemption of state tort claims rather than the appropriate forum for resolving federal claims, there is no occasion here for this Court to consider the *Gilmer* forum-selection issue vis-a-vis the RLA's mandatory arbitration provisions. We are constrained to note, however, that should an appropriate case reach this Court, the Solicitor General's asserted ground for distinguishing *Gilmer* (at 13 n.10), *i.e.*, that there is "tension between collective representation and individual statutory rights," does not apply in the RLA context, where employees are guaranteed the right to file and pursue grievances through RLA arbitration without union involvement and with their own counsel. 45 U.S.C. § 153 First (j); see pp. 6-7, *supra*.

D. The Hawaii Supreme Court's Preemption Rule Would Contravene The Policies of the R.L.A.

The rule adopted by the Hawaii Supreme Court would do violence to fundamental RLA policies. First, such a rule jeopardizes the consistency and uniformity in railroad and airline labor relations that Congress sought to protect. *E.g.*, *Pennsylvania R.R.* v. *Day*, 360 U.S. 548, 552-53 (1959). The railroad industry operates in 49 states and the airline industry operates in all 50 states, with most carriers operating in more than one state. Pinning preemption to the question of whether the elements of a particular claim require "interpretation" would hold Congress's policy of uniformity hostage to arcane distinctions in the substantive tort law of each state. For example, in *Beard* v. *Carrollton R.R.*, 893 F.2d 117 (6th Cir. 1989), the Sixth Circuit held that a claim for wrongful interference with contract under Kentucky law was preempted because Kentucky makes breach of contract an essential element of the claim, thereby requiring interpretation; the court observed, however, that under Ohio law, such a claim would not be preempted because Ohio law "is to the contrary." *Id.* at 122 & n.1. Even in the realm of retaliatory discharge, variations in state tort laws and the underlying fact patterns would result in confusion and inconsistent results. See *Magerer* v. *John Sexton & Co.*, 912 F.2d 525, 529 (1st Cir. 1990) (finding retaliatory discharge claims preempted under Massachusetts law but not the Illinois statute applied in *Lingle*); *Medrano* v. *Excel Corp.*, 985 F.2d 230, 233-34 (5th Cir.) (finding preemption because employee argued that collective agreement violated retaliatory discharge statute), *cert. denied*, 114 S. Ct. 79 (1993). Adding to these complications would be potential choice-of-law issues that could arise because employees in the airline and railroad industries often spend their working time in more than one state.

Thus, as the Fourth Circuit in *Rayner* warned, allowing state-law claims in such circumstances could result in "an unpredictable medley of jury determinations, which Congress, in its quest for national uniformity . . . sought to avoid." *Rayner* v. *Smiri,* 873 F.2d 60, 66 (4th Cir. 1989).

In addition to jeopardizing consistency and uniformity, a narrow preemption rule could undermine the integrity of the RLA's mandatory grievance processes. Rail and airline employees have formulated a wide variety of creative tort theories in attempts to bring their claims before a jury.[32] The rule adopted by the Hawaii Supreme Court would encourage such attempts by allowing artful pleading of claims that do not strictly depend on "interpretation" for their resolution. "[I]f the courts can be used as forums to resolve arbitrable disputes, employees can make an end run thereby avoiding the carefully crafted congressional procedures set forth in the RLA. These results cannot be squared with federal policy." *Tomaso* v. *Pan Am. World Airways, Inc.*, 733 P.2d 614, 621 (Cal.), *cert. denied*, 484 U.S. 829 (1987).

CONCLUSION

For the reasons stated above, the judgment of the Hawaii Supreme Court should be reversed.

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[32] See, *e.g.*, *Lorenz* v. *CSX Transp., Inc.*, 980 F.2d 263, 268 (4th Cir. 1992) (defamation); *Calvert* v. *Trans World Airlines, Inc.*, 959 F.2d 698, 700 (8th Cir. 1992) (international infliction); *Rayner* v. *Smirl*, 873 F.2d 60 (4th Cir. 1989) (retaliatory discharge); *Morales* v. *Southern Pac. Transp Co.*, 894 F.2d 743, 745-46 (5th Cir. 1990) (fraud); *Beard* v. *Carrollton R.R.*, 893 F.2d 117, 121-22 (6th Cir. 1989) (intentional infliction and interference with contractual rights); *Leu* v. *Norfolk & W. Ry.*, 820 F.2d 825, 829-30 (7th Cir. 1987) (fraud and conversion); *Schroeder* v. *Trans World Airlines, Inc.*, 702 F.2d 189, 192 (9th Cir. 1983) (wrongful demotion); *Magnuson* v. *Burlington N., Inc.*, 576 F.2d 1367, 1369-70 (9th Cir.) (intentional infliction), *cert. denied*, 439 U.S. 930 (1978); *Campbell* v. *Pan Am. World Airways, Inc.*, 668 F. Supp. 139, 145-46 (E.D.N.Y. 1987) (defamation and false imprisonment); *Carson* v. *Southern Ry.*, 494 F. Supp. 1104 (D.S.C. 1979) (slander).

Respectfully submitted,

RALPH J. MOORE, JR.
(Counsel of Record)
I. MICHAEL GREENBERGER
MARK S. RAFFMAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
KENNETH GRADIA
NATIONAL RAILWAY
LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7200

Attorneys for the National Railway Labor Conference

Dated: March 4, 1994